No. 86-1639

In The
Supreme Court of the United States
October Term, 1986

FLOYD H. VINSON

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JON L. FLEISCHAKER,
Counsel of Record for Respondent
KIMBERLY K. GREENE
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

May 8, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Courts below lacked jurisdiction over Petitioner's demotion claim filed pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.*, because Petitioner failed to file a charge with the Equal Employment Opportunity Commission concerning said demotion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

COUNTERSTATEMENT OF THE CASE

Petitioner was employed by Respondent[1] since 1964, and came to the Louisville Assembly Plant in 1974 as a Material Handling Manager, a salary grade 10 position in the Materials Department. In April 1978, the Materials Department at the Respondent's Louisville Assembly Plant consisted of five grade 10 managers reporting to Joe Weingart, the Materials Manager [Transcript of Trial (hereinafter "Tr") Vinson, 196; Weingart, 301].

In April 1978, Respondent decided to produce a new line of automobile at the Louisville Assembly Plant, necessitating the appointment of a Change-Over Coordinator to direct this change. This is a standard temporary position created whenever a new launch occurs [Tr. Ryan, 339]. Since Petitioner had requested reassignment to a different Ford plant, he was selected for this temporary grade 10 job while Respondent attempted to locate an alternative position for Petitioner. Respondent explained to Petitioner that the Change-Over Coordinator position would expire within one year [Tr. Vinson, 93; Weingart, 280; Ryan, 336, 399].

In the months preceding the expiration of Vinson's assignment as Change-Over Coordinator, Respondent made extensive efforts to find alternative opportunities for Petitioner [Tr. Ryan, 399]. None was available, however, because the automobile industry was in a severe economic slump [Tr. Vinson, 136; Ryan, 399] and the Louisville plant was experiencing severe reductions in the salaried

---

[1] The Rule 28.1 Statement of subsidiaries and affiliates of Ford Motor Company is included in Appendix A. Ford Motor Company has no parent corporation.

workforce [Tr. Ryan, 403]. Division headquarters had directed the Louisville plant to reduce the number of grade 10 positions in the Materials Department from five to four [Tr. Vinson, 114; Weingart, 313; Ryan, 336] and, pursuant to Company policy, one of the grade 10 employees had to be demoted.

In January 1979, Louisville made its decision to recommend the demotion of Petitioner, based on the factors required by Ford policy on reductions in the salaried workforce [Tr. Weingart, 313-316; Ryan, 325, 359-360]. Those policies require a comparative consideration of the performance and potential for promotion of all employees within the salary grade classification in question. On January 27, 1979, Weingart met with Petitioner, explained the situation to him and notified him that he was being demoted to a grade 8 position [Tr. Vinson, 35, 108]. Although Petitioner began in the new position immediately, the reduction in his salary was not effective until April 1, 1979 [Tr. Vinson, 37-38].

Despite the fact that he was aware of his rights under the Age Discrimination in Employment Act when he was advised of his demotion in January 1979 [Tr. Vinson, 44], Petitioner filed no charge of age discrimination with any public agency regarding his demotion [Tr. Vinson, 117-118]. In addition, he made no claims of discrimination to any official of Respondent [Tr. Ryan, 395-396]. The only complaint he made regarding his demotion was to an individual in the industrial relations department, of whom he asked "how's that [the demotion] possible?" Petitioner never complained about or mentioned age discrimination regarding his demotion [Tr. Vinson 108].

Subsequently, Petitioner had a conversation with Weingart about possible future job assignments, but Petitioner never raised his age or any claim of age discrimination arising out of his demotion [Tr. Vinson, 38, 40-43, 118-119]. Neither Weingart nor any other official of Respondent knew Petitioner had such a complaint or would file such a claim [Tr. Ryan, 395-396]. Petitioner met in September 1979 with the Assistant Plant Manager and the Industrial Relations Manager. Although he claims he was convinced at that time that Respondent had discriminated against him because of his age, Petitioner did not file a complaint with any agency alleging age discrimination in his demotion after that meeting [Tr. Vinson, 127; Baker, 224; Ryan, 396]. In fact, Petitioner *never* filed any charge or complaint regarding the 1979 demotion with the EEOC or any other administrative agency. Moreover, Petitioner never suggested in his testimony that any Company official exerted efforts to delay or prevent his filing such a charge.

In mid 1979, the Louisville Assembly Plant discontinued the second production shift. This entailed further reductions in the work force, including a further reduction in grade 10 positions in the Materials Department. On January 15, 1980, the Louisville plant evaluated the performance and potential of the remaining four grade 10 employees in the Materials Department and one of them was demoted. A grade 10 position for the second shift was eliminated and the three remaining grade 10 employees were reassigned to the remaining grade 10 positions. This reassignment was not a promotion [Tr. Weingart, 308; Ryan, 369]. Although Petitioner claimed he should have been promoted at that time, he agreed that there were no promotions in January 1980 to a grade 10 position in Louis-

ville, and that no grade 8 employee was promoted or considered for a promotion to grade 10 [Tr. Vinson, 126-127]. After a full trial, the jury also found that there was no promotion in 1980 and returned a verdict for Respondent on that claim.

When Petitioner failed to receive a promotion in January 1980, he filed a charge of discrimination with the EEOC on January 17, 1980, alleging only that he had been denied this promotion because of his age [Tr. Vinson, 44, 127]. In that charge Petitioner said absolutely nothing about the January 1979 demotion. That charge stated solely and simply: "I believe I were [sic] denied a promotion because of my age" [Tr. Vinson, 128]. In his employee personal interview statement to the EEOC, Petitioner mentioned several background facts about his employment dating back to 1964, including the fact that he had been demoted one year earlier. However, Petitioner made no claim in that statement [attached as Exhibit A to Petitioner's Petition for Certiorari] that the 1979 demotion was due to his age or was discriminatory in any way. In fact, Petitioner never offered the employee personal interview statement as evidence, and he never testified that he did not see or agree to the EEOC charge that was actually filed. There is absolutely no proof in the record of this case that the EEOC ever investigated the demotion claim or ever informed Respondent that Petitioner was protesting his demotion.

On April 10, 1982, Petitioner filed suit in the United States District Court under the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.* In the suit, he alleged that he was denied a promotion because of his age in January 1980 and, *for the first time,* Petitioner alleged that

he was demoted in January 1979 because of his age. The District Court denied Respondent's motion to dismiss the demotion claim. The action was tried to a jury in January, 1985, which found for Petitioner on his demotion claim but against Petitioner on his failure to promote claim.

After trial Respondent moved for judgment notwithstanding the verdict on the grounds, *inter alia*,[2] that the District Court lacked jurisdiction over Petitioner's allegation of age discrimination in his 1979 demotion because that claim was never the subject of a complaint to the EEOC. The District Court found that Petitioner had failed to file any charge with the EEOC concerning his 1979 demotion and entered judgment for Respondent on this and other grounds [Memorandum Opinion, R.E. No. 46 at p.2]. The Court of Appeals for the Sixth Circuit affirmed:

> The [district] court, based on the evidence presented at trial, this time sustained [Respondent's] motion, finding that, in fact, [Petitioner] did not file any charge of age discrimination concerning the 1979 demotion with the EEOC or any administrative agency. Accordingly, the court determined that it was without jurisdiction as to that claim.

Vinson v. Ford Motor Company, 806 F.2d 686, 688 (6th Cir. 1986).

---

[2] The other grounds were: [1] even if the court found the 1980 EEOC charge somehow included a claim regarding his demotion, it was untimely because it was filed more than 300 days after the demotion, 29 U.S.C. § 626(d)(2); and [2] the lawsuit was filed some three years and three months after Petitioner's demotion so that his claims regarding the demotion were barred by the applicable statute of limitations, 29 U.S.C. § 255(a).

———o———

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit is entirely consistent with applicable decisions of this Court. This Court has held that the filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to the filing of a civil action under the Age Discrimination in Employment Act. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Because the District Court, after a full trial on all contested issues including jurisdiction, found that Petitioner had failed to file an EEOC charge regarding his 1979 demotion, the District Court lacked jurisdiction over the claim and properly entered judgment for Respondent notwithstanding the jury verdict for Petitioner. Consistent with *Oscar Mayer, supra,* and other decisions of this Court, the Court of Appeals properly affirmed.

———o———

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT, AS REQUIRED BY SUPREME COURT RULE 17.1.

Supreme Court Rule 17.1 provides that review on writ of certiorari will be granted "only when there are special and important reasons therefor." The Rule sets forth three such reasons, including SCR 17.1(c):

> (c) When a . . . federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner apparently refers to SCR 17.1(c) when he asserts that the writ should be granted because "the Court of Appeals (Sixth Circuit) rendered a decision in conflict with the rulings of this Court" [Petition p. 3].

Petitioner fails, however, to identify any decision of this Court which conflicts with the decision of the Court of Appeals for the Sixth Circuit in the present case. He cannot do so, because the Court of Appeals decision is entirely consistent with applicable decisions of this Court, most notably *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), one of the three Supreme Court cases cited by Petitioner.[3]

In *Oscar Mayer, supra,* this Court construed the provisions of the Age Discrimination in Employment Act ("ADEA"), which require a party to file the appropriate administrative charge of discrimination as a prerequisite to filing a civil action in federal court. Those sections provide, in pertinent part:

> No civil action may be commenced by an individual under this section until sixty days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission . . .

29 U.S.C. § 626(d).

---

[3] All three of the Supreme Court cases cited by Petitioner deal with the statutory deadlines for timely filing of an EEOC charge. Only *Oscar Mayer, supra,* also concerns the issue involved in the present case: whether a District Court has jurisdiction when the plaintiff had filed no EEOC charge at all. While this Court has held that the statutes' complicated *time* requirements for filing an EEOC charge are not jurisdictional and should be liberally construed, the actual filing of the charge, as set forth in 29 U.S.C. §§ 626(d) and 633(b), is jurisdictional. *Oscar Mayer, supra.*

> No suit may be brought under § 626 of this Title before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated: . . .

29 U.S.C. § 633(b).

Construing these provisions, this Court unequivocally held that the filing of a charge with the EEOC is a jurisdictional prerequisite to the filing of a civil action under the ADEA. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

This Court has reiterated this rule in other decisions. *See, e.g., Great American Federal Savings & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979), where this Court considered the parallel provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), and held that "an employee who believes himself aggrieved *must first file a charge with the federal Equal Employment Opportunity Commission.*" *Id.* at 373 [emphasis added]. In a footnote the Court stated that "filing a complaint with that authority is a predicate for assertion of the federal rights involved." *Id. Cf. Board of Regents of the University of the State of New York v. Tomanio,* 446 U.S. 478, 491 (1980).

The lower courts have uniformly adhered to the rule articulated in *Oscar Mayer, supra. See, e.g., McTighe v. Mechanics Educ. Soc. of America Local 19,* 772 F.2d 210 (6th Cir. 1985); *O'Malley v. GTE Service Corp.,* 758 F.2d 818 (2d Cir. 1985); *Jones v. Truck Drivers Local Union No. 299,* 748 F.2d 1083, 1086 (6th Cir. 1984); *Wright v. Tennessee,* 628 F.2d 949 (6th Cir. 1980); *Ewald v. Great Atlantic & Pacific Tea Co.,* 620 F.2d 1183 (6th Cir. 1980), *vacated on other grounds,* 449 U.S. 914 (1980), *remanded,*

644 F.2d 884 (6th Cir. 1981), *cert. denied,* 451 U.S. 985 (1981). In *Wright, supra,* the Sixth Circuit clearly held that while the *time* for filing with the EEOC (*i.e.,* the 180/300-day requirement) is not jurisdictional, the filing of a charge *is* jurisdictional.

The Court of Appeals Opinion in the present case, like the many other decisions addressing this question, is consistent with this Court's ruling in *Oscar Mayer, supra.* Because Petitioner failed to file a charge of age discrimination with the EEOC regarding his 1979 demotion, the District Court lacked subject matter jurisdiction over Petitioner's claim concerning his demotion. Recognizing the rule articulated by this Court in *Oscar Mayer, supra,* the Court below held:

> It is well settled that the filing of a charge with the EEOC is a jurisdictional prerequisite to the filing of a civil action under ADEA. *Oscar Mayer* [*supra*]; 29 U.S.C. § 626(d). . . . [T]he *requirement that a claimant file a charge which identifies the conduct he believes is discriminatory is not a hypertechnical legal prerequisite.* All [Petitioner] was required to do was identify that conduct which he felt was the result of age discrimination. It does not constitute an unjustifible burden on claimants to require them to specify each such event. And it is necessary, if the administrative process is to work, that a claimant so articulate his beliefs. Accordingly, the district court did not err in granting judgment n.o.v. in favor of defendant [emphasis added].

Vinson v. Ford Motor Company, supra at 688.

Nothing in the Court of Appeals Opinion conflicts in any way with this Court's decision in *Oscar Mayer, supra,* or any other decision of this Court. Respondent argues that this Court's statement in *Oscar Mayer, supra,* and the

two other cases he cited that "courts should liberally construe the statute" [Petition, p. 3] means his failure to file a charge concerning his 1979 demotion should have been excused below. Petitioner misreads *Oscar Mayer* and the other decisions.

This Court considered other issues in *Oscar Mayer,* including whether the statutory time limits for commencing administrative proceedings were jurisdictional. The Court held that those statutory provisions did not make timely EEOC filing a precondition for a civil action, so the complicated time requirements in the Act should be liberally construed. *Oscar Mayer, supra* at 762, *citing Love v. Pullman Co.,* 404 U.S. 522, 527 (1972). Nevertheless, even applying this liberal construction of the statute's time limitations, there nevertheless remains the jurisdictional requirement that an EEOC charge concerning the alleged discriminatory act must be filed before a civil action may be commenced.

Petitioner now argues that this Court's discussion in *Oscar Mayer* of the unrelated timeliness issue somehow applies to the present case and, therefore, that his January 17, 1980 EEOC charge concerning a failure to promote him in 1980 should be "liberally construed" to include an additional and entirely separate charge that he was demoted one year earlier because of his age. This demotion in January 1979 was entirely separate from and independent of the failure of Petitioner to be promoted in 1980 and Petitioner's argument flies in the face of the *Oscar Mayer* rule because Petitioner's 1980 EEOC charge contained *no* allegation whatsoever of age discrimination relating to his demotion. His charge stated simply: "I believe I were [sic] denied a promotion because of my age."

Petitioner argues that the fact that he "mentioned the 1979 demotion in the Employee Personal Interview Statement" [Petition p. 5] should be sufficient for this Court to adopt his outlandishly strained interpretation of his 1980 EEOC charge. Petitioner is in error. He mentioned numerous facts about his employment dating back to 1964 in his employee personal interview statement. As the Court of Appeals specifically noted, however, Petitioner did not claim that any of these incidents, other than the 1980 denial of a promotion, was caused by age discrimination:

> [I]n that statement [Petitioner] complained about a series of events, the demotion being one of many, which culminated in [Petitioner's] belief he had been discriminated against based on age when he was denied a promotion in 1980. [Petitioner] does not indicate that these other incidents were other than historical background relative to the specific EEOC charge filed.

Vinson v. Ford Motor Company, supra at 688.

This Court has held that such "historical background" does not constitute a separate and independently cognizable claim of discrimination.

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately con-*

> *sidered, it is merely an unfortunate event in history which has no present legal consequences.*

United Air Lines v. Evans, 431 U.S. 553, 558 (1977) [emphasis added].

The District Court and the Court of Appeals properly found that the mere mention of the 1979 demotion by Petitioner in his 1980 statement to the EEOC, without any allegation that it was discriminatory, simply does not constitute a "charge" filed with the EEOC.[4] Petitioner's argument is completely contrary to the requirement that an EEOC charge be explicit on its face about the acts of discrimination alleged. His 1980 EEOC charge alleged discrimination *only* in his 1980 promotion: "I believe I were [sic] denied a promotion because of my age." To construe that charge to encompass a 1979 demotion would violate the EEOC regulation which requires that "[e]ach charge should contain . . . [a] clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. ¶1601.12(a)(3). This Court has held that "[u]ntil rescinded, this rule is binding on . . . complainants." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984).

Petitioner was obliged not only to allege the proper jurisdictional facts but also to establish "by competent proof" that the District Court had jurisdiction over his 1979 demotion claim. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Petitioner did not

---

[4] Moreover, it is questionable whether the employee personal interview statement itself can constitute a formal EEOC charge. *Proffitt v. Keycom Electronic Publishing*, 38 E.P.D. (CCH) ¶35,783 (N.D. Ill. 1985).

do so. Even if Petitioner could legitimately argue that the employee personal interview statement constituted an EEOC charge, that statement was never mentioned or otherwise proven "by competent proof" at trial. *Id.* Moreover, Petitioner never testified that he had not seen or agreed to the wording of the 1980 EEOC charge, and he never offered proof that the EEOC investigated a demotion claim or informed Respondent that such a claim existed. After a five day trial the District Court made a factual determination that Petitioner had not filed the required EEOC charge concerning the 1979 demotion and that the District Court, therefore, lacked subject matter jurisdiction over that allegation.[5]

The decision of the Court of Appeals follows exactly this Court's holding in *Oscar Mayer, supra,* that the actual filing of an EEOC charge is a jurisdictional prerequisite to bringing a civil action. Petitioner has identified no Supreme Court decisions to the contrary. Therefore, the present Petition for Writ of Certiorari should be denied.

———o———

[5] Petitioner's case was frought with problems in addition to the lack of subject matter jurisdiction over his demotion claim. First, even if Petitioner's January 1980 charge of discrimination were deemed to encompass his January 1979 demotion, the January 1980 charge was filed with the EEOC more than 300 days after the demotion. Thus, the January 1980 charge was untimely as to the 1979 demotion. 29 U.S.C. § 626(d)(2). Moreover, Petitioner presented absolutely no evidence that would justify tolling this time requirement.

Second, Petitioner did not initiate the lawsuit until April 10, 1982, some three years and three months after his demotion. Therefore, his claim of discriminatory demotion was barred by the applicable statute of limitations. 29 U.S.C. § 255(a).

CONCLUSION

For the reasons stated above, the Respondent, Ford Motor Company, respectfully submits that there are no special or important reasons for granting a Writ of Certiorari in this case, and respectfully urges this Court to deny the present Petition.

Respectfully submitted,

JON L. FLEISCHAKER,
Counsel of Record for Respondent
KIMBERLY K. GREENE
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

APPENDIX A

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent Ford Motor Company:

Agromak, S.A. de C.V. (FTA)
Allied Tractor Limited
American Network, Inc.
Amim Holdings Sdn. Bld.
Anhanguera Leasing S.A.-Arrendamento Mercantil
Assembly Plant Material Services, Inc.
Bongotti S.A. Industria e Commercio de Radiadores
Canapro S.A.R.L.
Carnegie Group Inc.
Carplastic, S.A.
Ceradyne Advanced Products, Inc.
Compania Financiera de Inversones y Credito S.A.
Conix Corporation
Consorcio Nacional Ford Ltda.
Distribuidora Ford de Titulos e Valores Mobiliarios Ltda.
Double Eagle Steel Coating Company
Eik & Hausken A/S
Escorts Tractors Limited
Essex Manufacturing
Eveleth Taconite Company
Excel Industries
Fabrica de Tractores Agricolas S.A.
Fairlane Woods Associates
FCP Finance Corporation
1st Nationwide Network, Inc.
Foral Services Proprietary Ltd.
Ford Administracao e Consorcios Ltda.
Ford Brasil S.A.
Ford Credit A.B.
Ford Credit A/S
Ford Credit B.V.

Ford Credit Bank Aktiengesellschaft
Ford Credit N.V.
Ford Credit S.A.
Ford Credit South Africa (Proprietary) Ltd.
Ford Distribuidora de Produtos de Petroleo Ltda.
Ford Financiadora S.A. Credito, Financiamento e Inv.
Ford Investitions-GmbH
Ford Investitions GmbH & Co. oHG
Ford Lio Ho Motor Company Ltd.
Ford Motor Company Aktiebolag
Ford Motor Company A/S
Ford Motor Company (Austria) K.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company of Australia Limited
Ford Motor Company of Canada, Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private Limited
Ford Motor Company (Switzerland) S.A.
Ford Motor Credit Company of New Zealand Limited
Ford Motor Norge A/S
Ford Nederlands N.V.
Ford Overseas Finance N.V.
Ford Sales Company of Australia Limited
Ford Vehicle Finance
Ford Versicherungs-Vermittlungs GmbH
Ford Versorgungs und Unterstutzungseinrichtung GmbH
Ford-Werke Aktiengesellschaft
Fords Vagnskadegaranti A.B.
General Electric Credit Auto Resale Service, Inc.
Halla Climate Control Corp.
Hokkai Ford Tractor Co., Ltd.
Humboldt Mining Company
Implementos Agricolas Mexicanos, S.A.
Iveco Ford Truck Limited
Kia
Mazda Motor Corporation
Metro Investment Service Corporation
Nascote Industries, Inc.
Nemak, S.A.
New Holland Japan Inc.
New River Casting Company

Otomobil Sanayii A.S. (Otosan)
Oy Ford Ab
Oy-Ford Rahoitus Ab
Quimica Parker, S.A. de C.V.
Renaissance Center Partnership
Renaissance Center Venture
Saar-Industrie GmhH
Sao Francisco Maquinas e Ferramentas Ltda.
South African Motor Corporation (Proprietary) Limited
Sukat Real Estate Holdings
Synthetic Vision Systems, Inc.
TG Ford Associates
Trans Canada Glass Ltd.
Thace
Vitro Flex S.A.